Proposed Paper for a Conference at Tufts University re Covert Action & Secrecy

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The Legitimacy of Covert Action and Secrecy: Sorting out the Moral Responsibilities of American Citizens and their Public Servants

Lincoln P. Bloomfield, Jr., U.S. Department of Defense

Introduction: The Issues Raised by Iran-Contra

Since the American people declared their independence from the British crown, we have exhibited a strong anti-authoritarian streak. Every U.S. President has, undoubtedly, puzzled over the conflicting emotions of a people who love their elected leader when he looks strong but often recoil when he acts that way. The American public today is quick to humble its elected leaders and representatives whenever it feels that they are exceeding their popular mandate. The Watergate hearings were, for many Americans, cathartic in that they brought officials who had secretly abused the public trust before the court of public opinion. Congress' standing with the public was enhanced.

When the Congress called for Iran-Contra hearings to be held in 1987, comparisons with Watergate were inescapable, if only because of the televised format. The differences, however, were profound. Whereas the Watergate witnesses had been motivated by the advancement of their personal political fortunes, the Iran-Contra officials were pursuing national policy objectives in the Middle East and Central America. Whereas President Nixon had been named as an unindicted co-conspirator for his actions, President Reagan's actions fell within the scope of his authority. Whereas President Nixon was faulted for covering up the facts, President Reagan opened up his Administration's files and instructed

all officials to testify fully and truthfully. He initiated the non-partisan Tower Commission investigation, and named an Independent Counsel to probe possible violations of the law. Where procedures were found to have been wanting, the President reformed them. Clearly, President Reagan's response to the Iran-Contra revelations was to restore the public's confidence in the Executive, whatever the political cost to him.

Some who followed the Iran-Contra investigations closely recognized these basic differences between Iran-Contra and Watergate; others appeared content to let comparisons stand. Congress took particular umbrage at not having been told about either the President's initiative to sell arms to Iran or the extent of the NSC staff's actions in support of the Nicaraguan resistance. For some Americans, the spectacle of the Congress publicly berating the Administration for its secret endeavors gave vent to their feelings of frustration, tapping once again into the popular sentiment which resists delegating power to anyone -- even the nation's chief executive.

What the unfavorable national reaction to Iran-Contra obscured, however, was that those powers had indeed been delegated by the people to their President, in Article II of the Constitution. In this most dynamic and open democracy, there is an unavoidable tension between the citizen's deeply felt need to control his representatives, and his recognition that the well-being of the state requires the capability to cooperate confidentially with other states in a dangerous world, and to act secretly in defense

of those interests.

Covert actions -- actions conceived and carried out in secret, and intended to be kept secret forever, confront the citizen with the uncomfortable thought that, in this instance at least, he is trusting his representatives completely to act on his behalf. This trust is severely tested by sensational public revelations of alleged covert action failures or misdeeds, particularly since the government does not usually address the subject in public.

What follows is a discussion of the anomalous but necessary role of covert action in the functioning of an open democracy. This observer's belief is that the world does not permit the United States the luxury of forswearing a capability to act secretly. What might surprise disillusioned citizens is how much the system is receptive to their values and policy preferences.

The Limits on Covert Action

Covert action is not a substitute for any other tool of national policy or influence. The secrecy involved is as perishable as it is essential, so that only activities of modest scope and duration can reasonably be expected to remain secret. The other primary limiting factor -- feasibility -- is beyond the control of anyone. Other than circumstantial constraints, however, the most significant limits on covert action are the limits on covert actors.

The American system of government affords several protections against the exercise of absolute power of the sort that Lord Acton deplored, without negating the power itself. Some examples:

-- The President is popularly-elected, serves a finite term of office, and exercises only those powers enumerated in the Constitution.

-- The Congress has the Constitutionally-based power of the purse, and an intelligence oversight role which includes being informed of covert actions. Should Congress ever conclude that the President is abusing the powers of his office and that regular checks and balances are not adequately safeguarding the national interest against these abuses, procedures exist for Congress to remove the President.

-- Statutes of law impose discipline on Executive branch participants in the covert action process, including General Counsels at CIA and NSC and the Attorney General, all of whom review covert action intelligence Findings before they are signed by the President.

-- The personal integrity of public servants, beginning with the President, and including appointed officials, career civil servants, and military personnel, serves as a factor in the policy process. Because equal opportunity exists for any qualified citizen to gain employment with the government, the system incorporates the values of a broad cross-section of Americans.

Reciting basic civics tenets may seem out of place when discussing covert action, a realm of activity more frequently portrayed by its critics as anti-democratic, unrepresentative of

the popular will, and therefore illegitimate. Precisely because of the factors cited above, however, U.S. covert actions meet any test of legitimacy which can reasonably be applied to a state.

There remains the theoretical case of a covert action in which public servants break the law or otherwise act dishonorably, and their misdeeds are kept secret from the Congress and the public. What safeguard is available to the country against secret abuse of the public trust?

The Quest for Perfection -- The Enemy of Good Government?

Combined power and secrecy can, theoretically, beget corruption. Those who object to the present statutory framework for covert action propose denying the President the discretion to exercise secret, unilateral power in this area under any circumstances, thereby -- again, theoretically -- eliminating the potential for unchecked corruption and abuse.

That is the essence of the House and Senate legislation to require Presidential notification of covert actions to the Congress within 48 hours. The President's unilateral power to conduct a covert action and control authoritative knowledge of it within the government would, no matter what the circumstances, be eliminated. Among the problems with this approach:

-- It would purport to "remove" powers which are vested in the President by Article II of the Constitution. Even if the CIA were abolished, the President would still have the sworn responsibility to preserve, protect and defend the

Constitution -- whatever means he chose to fulfill that task.

-- It would not add one iota of protection against the theoretical secret abuser of the public trust described above. New laws are no defense against lawbreakers.

Leaving aside the merits of either side of the Constitutional debate, the very fact of such a disagreement between the branches would have adverse implications for the covert action process if the Congress were to pass legislation such as this over the President's veto.

-- An intelligence statute which the President and Congress viewed as an arena of contention over Constitutional "turf" would undermine the very atmosphere of trust and candor between the branches which responsible officials in both branches agree is essential to a successful national intelligence program. Indeed, it was just such an atmosphere of mistrust which appears to have led the President to withhold notification of the Iran initiative, and the NSC staff to conceal some of its Central America efforts, from the Congress.

-- When a Constitutional disagreement is incorporated into an the law, as happened with the War Powers Resolution, the legal counsels in the Executive Branch have two jobs: while advising policymakers on how to keep their actions consistent with statutes, they are expected to exert no less effort in laying the legal groundwork for Executive non-compliance with

the statute on Constitutional grounds, should the President choose such a course. This has been the experience with military deployments since the Congress passed the War Powers Resolution in 1973 over President Nixon's veto.

Notwithstanding the President's Constitutional prerogatives, sponsors of the proposed new intelligence oversight legislation appear unsatisfied with the idea of trusting a President not to abuse his secret power. At a December, 1987 public hearing held by the Senate Select Committee on Intelligence to consider S. 1721, the proposed Senate legislation, Secretary of Defense Carlucci described the extensive changes in personnel and procedures -- including President Reagan's willingness to notify the Congress of covert action Findings no later than 48 hours after they are signed -- which had been undertaken with respect to covert action in the aftermath of the Iran-Contra affair. The Committee Vice Chairman, Senator Cohen, indicated his satisfaction with these new procedures, but noted that they were expressed as Presidential policy, not codified in the law. The Senator told Secretary Carlucci, "you may no longer be here next year, and so we have no guarantee in terms of the continuity of those procedures, personnel, atmosphere, [and] environment....it seems to me that this is an appropriate thing for us to pursue to make sure that we try to maintain the same line of propriety."

The Secretary responded by cautioning the members to be careful about the boundary between necessary legislative action and appropriate administrative action, saying, "We have to allow our

Presidents to administer." Referring to a National Security Decision Directive (NSDD) on covert action procedures which President Reagan had promulgated in 1987, Senator Cohen said he thought the NSDD had gone "a long way in the right direction; but the next President might totally change it, might decide to throw it out the window." Secretary Carlucci, noting that the NSDD was very detailed, specifying which interagency groups were to work on particular problems, reiterated his commitment to proper Executive Branch procedures and close Executive consultation with the intelligence committees regarding covert actions; but he drew a line beyond which Congress should not reach into the Executive policy process, telling the Senator, "if you are saying that you have to have absolute and total unrestricted knowledge into every President's internal management processes, that is just an impossible order." Senator Cohen responded that "no one on this Committee is asking for that."

Secretary Carlucci was emphasizing the point that one branch of government cannot try to put another branch on "auto-pilot," as it were, by taking one President's preferred management practices and imposing them on all future Presidents. The Tower Commission recommended "that each administration formulate precise procedures for restricted consideration of covert actions and that, once formulated, those procedures be strictly adhered to."[1] The proposed Senate and House legislation would, however, impose President Reagan's procedures on his successors. Additionally, it would mandate sweeping Congressional access to Executive Branch information, where access has heretofore been granted consensually.

Here the question arises as to whether one branch of government should attempt to "chaperone" another; at what point does oversight become intrusive to the point of inhibiting good work in the name of preventing bad? The medical profession may offer some insight. In certain states where courts have consistently ruled in favor of patients and awarded them large claims in medical malpractice suits, an increasing number of surgeons is reportedly refusing to operate on needy patients, for fear of facing costly recriminations. In considering new intelligence oversight legislation, the Congress must consider the practical effect of the oversight system on the functioning of the intelligence community itself.

A new statute would effectively end the President's traditional control over his intelligence bureaucracy. While the Congress has not claimed a share of the President's authority over covert actions, the effects of sweeping access to the Executive Branch would be the same. Like the surgeon unwilling to risk a malpractice suit, intelligence professionals could be expected to avoid actions in the field -- however essential to their missions -- where time did not permit full-scale review and Congressional consultations in Washington. A recriminatory environment would discourage initiative and innovation in the intelligence bureaucracy.

In Congress, as well, a statute suggesting that certain members of Congress always know the details of every covert action could place those members in the position of appearing to have supported the President's actions, should the actions be revealed publicly. Fear of political "guilt by association" could inhibit the smooth

functioning of intelligence operations. This may not be the intent of the Congress -- far from it. Yet members of the Iran-Contra and Senate intelligence committees have stated repeatedly that, had the President advised the Congress of his covert action Finding to sell arms to Iran, the American people would have been spared this difficult problem. What these members would have done to stop the President is unclear, since the President had the authority to sell arms to Iran (and indeed, has the authority to do it again). In exercising its oversight responsibilities, Congress should welcome a modicum of political "deniability," since it does not control these operations.

To summarize: no one in either branch is dissatisfied with the present covert action review and reporting procedures authorized by President Reagan; but the intelligence committees are not content to trust future Presidents to implement satisfactory procedures of their own. Under our system of government, however, it is the voters -- not the Congress -- who make the decision to entrust their elected Presidents with Constitutional Article II powers; and the powers of one branch of government may not be taken away by another branch.

Injecting this Constitutional disagreement into the law governing intelligence activities is an invitation for trouble, given that the country must live with the same Constitution. In seeking to make the system abuse-proof, sponsors of the new legislation court the risk of immobilizing the system with a perpetual atmosphere of confrontation over prerogatives between

leaders in both branches, as well as fear of unreasonable legal recrimination in the intelligence bureaucracy and fear of misplaced political responsibility in the intelligence committees. It is not a prescription for good government.

Observers who are not content with the present state of affairs -- notwithstanding the President's post-Iran-Contra reforms -- would would do well to contemplate yet another fact of life in Washington: just because a mistake is made in the Executive Branch does not guarantee that subsequent Congressional actions undertaken in the name of oversight will further the public interest. They often are salutary, but Congress claims no special exemption from the laws of human nature.

Accountability -- When Overseers Overreach

When the Iran arms sales and the probable diversion of funds to the Nicaraguan resistance became public in late 1986, President Reagan appointed former Senator John Tower, former Secretary of State Edmund Muskie and former National Security Advisor (and retired Air Force Lieutenant General) Brent Scowcroft to conduct a full investigation of the affair. Their report, issued on February 26, 1987, offered the public a comprehensive narrative of what had transpired. Subsequently, the Congressional Iran-Contra committees conducted their investigation and issued a report in November 1987.

The conclusions and recommendations of the Tower Commission and Congressional reports were, by nature, subjective; observers could agree or disagree about the significance of the events

under investigation, the correctness of the role of each participant, whether any changes were warranted in the processes of government as a consequence, and if so, what changes. With respect to the factual narratives themselves, however, there were important qualitative differences between the two reports. In the opinion of this observer, the Tower Commission narrative represents the more dispassionate search for the truth of the two. How so?

The Congressional Iran-Contra committees, for reasons of their own, set up their investigation quite differently from the Tower Commission inquiry, in two main respects:

1. The Congress set out to expose lawbreaking. The Tower Commission consisted of three of the most experienced public servants in America, spanning Republican and Democratic parties and the Executive and Legislative branches, to investigate the matter. These principal Commission members conducted most or all of the interviews. In contrast, the Congressional panels imported attorneys from the private sector -- in the case of the Senate committee, a Wall Street attorney whose excellent reputation had been earned not in the Washington policy community, but in the area of securities fraud, embezzlement and other white-collar financial crimes.

Where the Tower Commission examined how the policy process had functioned in the Iran-Contra matters, the Congressional committees "were charged by their Houses with reporting violations of law and 'illegal' or 'unethical' conduct."[2] During the latter's hearings, when attorneys for witnesses under simultaneous

investigation by the Independant Counsel protested that the committees were prejudging criminality at the expense of their clients' rights to due process, the committees (now disclaiming any such purpose) redirected the focus of their questions toward the bureaucratic process. From this point on, in this observer's opinion, the counsels' unfamiliarity and even confusion about the policy process in Washington was manifest. As a consequence (again, in this observer's judgment), the Congressional report's treatment of the policy process was less focused, and ultimately carried less weight, than that of the Tower Commission.

2. The Congress televised its proceedings. Once the Congress chose to hold open hearings, to include televised broadcast to over 100 countries around the world, the purpose of the investigation became wedded to two not necessarily reconcilable goals: seeking the truth; and "telling the story" to the public. What appeared on the television screen was genuine as far as it went. However, because of public interest in the hearings, the investigators themselves inevitably developed a personal stake in generating favorable public perceptions of their own performances. Having promoted such interest in the hearings, the legislators were, understandably, eager to demonstrate that such an extraordinary public tribunal was justified.

This approach satisfied many citizens in the sense that the Congress served as a surrogate for the venting of popular emotions aroused by the Iran-Contra revelations. Had Congress held its inquiry behind closed doors and concealed its findings, public confidence in the integrity of the process would probably have

suffered. However, in several respects the highly-publicized hearings were affected by considerations which detracted from a dispassionate search for the truth:

- Important parts of the story were never told. Viewers were left with the odd impression that the Administration and the Congress communicate only by mail or in formal hearings when, in fact, the much-discussed Boland Amendment formulations were far more the product of close, informal collaboration between officials in both branches than of careless draftsmanship.

- The Congress' deep and abiding interest in supporting U.S. relations with Israel -- while perfectly legitimate -- nevertheless led it to avert its gaze from Israel's key role in this matter, other than as an adjunct to the actions of other participants in the affair. In the Congressional report, a chronology provided by the Government of Israel to the committees was used as the sole source for significant assertions of fact -- even when officials of the United States Government had provided evidence to the contrary. The point here is not to question Israel's actions, statements or motives in any way, merely to cite an overriding consideration on the investigators' part which could fairly be termed a conflict of interest.

- A standard of entertainment value appears to have been applied to the choice of testimony to be taken before the television cameras. If a staff counsel assigned to

cover a particular executive branch agency persuaded the senior counsels that he had turned up "sexy" testimony, his reward was to conduct the questioning himself on international television.

What was particularly misleading about this concern for media interest was the near-total failure of the committees to show the viewing public the backdrop against which the Iran-Contra actions occurred -- namely, a national security, intelligence and diplomatic apparatus which functioned correctly, competently and productively, for the most part, in the service of the national interest during this same period. Viewers might have been less likely to question the inability of senior officials to recall certain statements, documents or activities if the hearings had also given the public some appreciation of the enormity of the scope and the pace of daily activities of the nation's most senior national security executives.

- In particularly sharp contrast to the Tower Commission, the Congressional committees seem not to given a high priority to weighing conflicting information and rendering a considered collective judgment on what they believed to be the truth in each instance. Undoubtedly, the large membership of the committees (26, compared to 3 Tower Commission members) made consensus more elusive; this observer also believes, however, that the publicity of the hearings and the strong public reactions feeding back to Members' offices throughout the proceedings

magnified the members' mutual disagreements, at the expense of consensus.

As a result, not only did the committees submit two reports -- a majority and a minority report -- reflecting different analysis and conclusions, but the factual narrative of the majority report lacked authority. After prefacing the report with the statement that four primary witnesses had "all told conforming false stories" about U.S. involvement in arms shipments to Iran, the report's authors relied exclusively on the testimony of three of them to support a substantial portion of the narrative (see majority report footnotes), with no corroborative sources or any apparent hesitancy to accept their testimony as fact. Numerous investigative loose ends highlighted in the Tower Report were not acknowledged, much less pursued, in the Congressional report.

The point here is not to demean the efforts of the Congress, but to point out that its Iran-Contra proceedings turned into more of a surrogate national debate than an authoritative factual inquiry. Reflecting the wide spectrum of public opinion and ideology, the hearings provided an outlet for tensions between the branches, and perhaps within them, which may initially have contributed to the great secrecy with which the Iran-Contra activities were undertaken. Indeed, officials in both branches have remarked on the improved atmosphere of mutual cooperation in recent months.

That said, it also follows that the recommendations of the Congressional report derive less from the facts of the Iran-Contra affair than from other, more subjective factors, including the Congress' understandable desire to appear to have "fixed" the "problems" of the Executive Branch. In the case of the proposed intelligence oversight legislation, this recommendation does not even flow from the report's own conclusions. Referring to the existing body of "laws and procedures to control secret intelligence activities, including covert actions," the report says, "Experience has shown that these laws and procedures, if respected, are adequate to the task. In the Iran-Contra Affair, however, they were often disregarded."[3] The Tower Commission's only recommended change to the system of intelligence oversight was that the House and Senate Intelligence Committees be replaced by a smaller joint committee with a reduced staff, to enhance confidence within both branches that secrets would be safe and could be shared.[4]

In sum, those familiar with the Iran-Contra affair and intelligence oversight issues should recognize that the statutory changes now under consideration in the Congress do not conform to the findings of either the Tower or the Congress' own investigation; and that the net effect of such legislation upon the workings of the intelligence community might be to render it less effective -- while still affording the nation no new protection against an unscrupulous operator willing to disregard the law and proper procedure.

As for the fear that future Presidents might misuse any freedom of action (what Congress might term "loopholes") left to them in the laws relating to covert action, there is no doubt that the tremendous political repercussions of the Iran-Contra affair will give future decisionmakers pause as they consider how the public might react to prospective initiatives, if revealed. The lesson that covert actions must reflect purposes and methods that would be understood and accepted by the public, if revealed, has come through loud and clear, and is now a cardinal tenet of the formal review process.

Conclusion: What is Wrong with the Ends/Means Debate

Sissela Bok has written:

> "When linked, secrecy and political power are dangerous in the extreme. For all individuals, secrecy courts some risk of corruption and irrationality; if they dispose of greater than ordinary power over others, and if this power is exercised in secret, with no accountability to those whom it affects, the invitation to abuse is great....In the absence of accountability and safeguards, the presumption against secrecy when it is linked with power is very strong."[5]

The above words do not apply to the system of managing covert actions in place today in Washington. By virtue of existing statutes and Presidentially-directed procedures, secrecy is not absolute, and accountability to the Congress is maintained in practice, notwithstanding the President's unwillingness to yield the Constitutionally-based prerogatives of his office. Even in the theoretical instance wherein the President believed his unique Executive responsibilities required him to act in total secrecy, Ms. Bok's "strong" presumption against secret

power would be mitigated by two important facts: those powers are willingly given by the citizen to the Executive under the Constitution; and the President is chosen by the citizen to Execute those powers.

It is quite natural that many Americans are suspicious of what their Government will not tell them, disenchanted when actions taken secretly on their behalf turn out to be mistakes in retrospect, and supportive of any suggested remedial measures which would appear to strengthen the oversight of secret power. All of these sentiments reflect strong character traits common to Americans, and proudly held.

A periodic national self-examination such as has occurred in the aftermath of the Iran-Contra revelations calls for more than the instinctive venting of the democratic bias against secrecy, however. It requires perspective -- circumstantial as well as moral (indeed, the two are inseparable) -- on the purposes of government, the duties of those who serve in government, and the responsibilities of the citizen.

"Selling arms to terrorists," as the Iran arms sales have so often been characterized, sounds immoral; and critics have said that the objective of obtaining the freedom of captive Americans and creating an official U.S. channel to elements of the government in Iran did not justify the sale of arms to Iran. Yet a President's military alliance with a foreign leader who, by one historian's recent estimate, killed over sixteen million

of his citizens, was universally supported by the American people, as was his successor's dropping of atomic weapons on two foreign cities.

Clearly, the "means" used in pursuit of the national interest cannot be morally examined in isolation. The "ends" of national survival as a secure and independent republic justify measures in some circumstances which would be unjustified in others. Secrecy can be a sine qua non of good government, just as it can be an instrument of bad government. Passing a negative moral judgment on the tools of covert operations -- the use of untraceable funds, deception, selective violence or coercion, and the like -- is tempting, but utterly meaningless when detached from the circumstances on which basis national leaders decide whether such steps are warranted.

The frustrating reality for citizens, of course, is that the totality of those explanatory circumstances can never be shared with the public, because they include information gained through classified methods and the confidences of foreign sources. Regardless of how much information is revealed to the public by the President or the Congress, as in the Iran-Contra hearings, there remain entire categories of information which no official on either end of the investigatory process would see fit to place in the public realm. The fact is that citizens can never gain a complete appreciation of the judgments which their leaders must render and the choices they must make in matters of national security.

Members of Congress are frequently heard giving voice to the public's frustration at the perceived hoarding of information and guarding of prerogative in sensitive foreign affairs by the Executive. They regularly invoke the American people's right to know about these matters and to share in the process of reaching important policy decisions. To the extent that foreign confidences will not be betrayed by public discussion of the issues, they are absolutely justified in seeking open policy debate.

Under Articles I and II of the Constitution, however, the American people do not hold either the Legislative or Executive powers: their elected representatives do. Not far into the future, technology might make it feasible for every citizen, sitting by his television set, to watch Congressional debates, identify himself and vote on resolutions as they are introduced, thereby substituting national referenda for Congressional votes. The reason this will never happen is that citizens do not elect Presidents and legislators to follow their every dictate, but to lead by reflecting their values and bringing sound judgment to bear on their behalf.

Good government strives to meet the objective that citizens will continue to enjoy "life, liberty, and the pursuit of happiness." While this end is greatly served by a vigorous free press and an interested, informed public, it is no less served by the ability to act effectively to protect the national interest. This may mean acting secretly, quickly, and even violently -- and keeping it secret, if possible, forever.

Where does the citizen exercise his control over the most secret, and thus elusive, aspect of his government? The answer is: at the ballot box. Making the laws on intelligence oversight more restrictive in order to assuage moral self-doubts about the United States will be for nought if leaders are elected who disregard them. Greater oversight could, in fact, turn out to be counterproductive if exigent circumstances undermined a future President's confidence in his ability to fulfill his Constitutional duties working within the existing statutory framework.

Rather than seeking to curtail the ability of our government to act in service of the national interest, the citizen should impose an electoral test which elevates men and women of the highest probity and judgment to assume these burdens of Constitutionally-based power.

Not only does such an approach have the advantage of bringing the best out of our public servants: it is the way the founding fathers intended the system to work.

NOTES:

1. Report of the President's Special Review Board, February 26, 1987, p. V-6.
2. Report of the Congressional Committees Investigating the Iran-Contra Affair, With Supplemental, Minority and Additional Views, November 1987, p. 411.
3. Ibid, p. 375.
4. President's Board, op. cit., p. V-6.
5. Bok, Sissela, Secrets - On the Ethics of Concealment and Revelation, (New York: Pantheon Books, 1982), p. 106.